IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAUDIUS ATKINSON, et al.,	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	NO. 99-1541
CITY OF PHILADELPHIA, et al.,	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, J. JUNE 20, 2000

Plaintiffs Claudius Atkinson ("Mr. Atkinson") and Cymbal Atkinson ("Mrs. Atkinson") brought this action against the City of Philadelphia, the Philadelphia Police Department, the Philadelphia District Attorney's Office, Philadelphia Police Detective Charles Meissler, and Philadelphia Police Officer Floyd Stepney alleging false arrest, false imprisonment, intentional infliction of emotional distress, malicious prosecution, and violation of their Fourth and Fourteenth Amendment rights under 42 U.S.C. section 1983 ("section 1983").[1] By Memorandum and Order dated March 20, 2000, this Court granted summary judgment in favor of the City of Philadelphia and the Philadelphia Police Department. Presently before this Court are the Motions for Summary Judgment of Defendants Philadelphia District Attorney's

[1] Although the Complaint also asserts violations under the First, Fifth and Eighth Amendments, the Plaintiffs have withdrawn these claims.

Office and Defendants Meissler and Stepney. For the reasons that follow, the motions are granted.

I. BACKGROUND.

This Court outlined the factual background in this case in Atkinson v. City of Philadelphia, No.Civ.A. 99-1541, 2000 WL 295106 (E.D.Pa. Mar. 20, 2000), and will repeat that recitation here. On or about May 30, 1997, Meissler, a Philadelphia Police Detective, submitted an Affidavit of Probable Cause ("the Affidavit") for the arrest of Mr. Atkinson to the Honorable Amanda Cooperman of the Philadelphia Court of Common Pleas. The Affidavit stated that Meissler had observed Mr. Atkinson at approximately 6:00 p.m. on May 12, 1997 selling a packet of marijuana to a Sharon Jones at 4610 Woodland Avenue in Philadelphia, Pennsylvania. The Affidavit also stated that Stepney, a Philadelphia Police Officer, had purchased a packet of marijuana from Mr. Atkinson at approximately 6:00 p.m. on May 12, 1997 at 4610 Woodland Avenue. The Affidavit also stated that Meissler observed Mr. Atkinson talking to an unknown male at 4610 Woodland Avenue at approximately 6:15 on May 13, 1997, and that Meissler then observed Mr. Atkinson drive away.

Plaintiffs claim that at the time Meissler produced the Affidavit to Judge Cooperman, both Meissler and Stepney knew the statements in the Affidavit were false, or that they had made them in reckless disregard for their truth or falsity. Moreover,

Plaintiffs claim Mr. Atkinson was not at or about 4610 Woodland Avenue at the time he was allegedly observed selling marijuana.

Pursuant to the Affidavit, a warrant was issued for Mr. Atkinson's arrest. Between May 30, 1997 and June 2, 1997, police officers entered the residence at 1010 Serrill Avenue in Yeadon, Pennsylvania, which is owned by both Plaintiffs, to search for Mr. Atkinson.[2] Plaintiffs claim that the police officers entered the residence with "force and intimidation" and that they "totally disrupted the lives of Plaintiff Cymbal Atkinson and her children, terrified them and inflicted severe emotional pain and suffering upon them." Compl. at ¶ 30.

On June 2, 1997, after being informed that the police were looking for him, Mr. Atkinson voluntarily turned himself in at the Philadelphia District Attorney's Office and was subsequently arrested pursuant to the warrant. He was charged with Possession of a Controlled Substance, Possession of a Controlled Substance with Intent to Deliver, and Conspiracy. After a two-day trial before the Honorable Felice R. Stack of the Philadelphia Municipal Court, Mr. Atkinson was found not guilty of the charges. Subsequently, on March 29, 1999, the Atkinsons filed the instant action.

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[2] Although Mrs. Atkinson and her children lived at this residence, Mr. Atkinson resided at 6070 Upland Street in Philadelphia, Pennsylvania.

II. STANDARD OF REVIEW

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and `the moving party is entitled to judgment as a matter of law.'" Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party carries the initial burden of demonstrating the absence of any genuine issues of material fact.[3] Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the nonmovant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the

[3] "A fact is material if it could affect the outcome of the suit after applying the substantive law. Further, a dispute over a material fact must be 'genuine,' i.e., the evidence must be such 'that a reasonable jury could return a verdict in favor of the non-moving party.'" Compton v. Nat'l League of Professional Baseball Clubs, 995 F. Supp. 554, 561 n.14 (E.D.Pa.) (citations omitted), aff'd, 172 F.3d 40 (3d Cir. 1998).

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Moreover, Federal Rule of Civil Procedure 56 provides that the court may only grant the moving party's motion for summary judgment "if appropriate," even where, as here, the non-moving party fails to oppose or answer a motion. Bardaji v. Flexible Flyer Co., No.Civ.A. 95-CV-0521, 1995 WL 568483, at *2 (E.D.Pa. Sept. 25, 1995). A grant of summary judgment is "appropriate" as follows

> where the moving party has the burden of proof on the relevant issues, . . . the district court must determine that the facts specified in or in connection with the motion entitle the moving party to judgment as a matter of law. Where the moving party does not have the burden of proof on the relevant issues, . . . the district court must determine that the deficiencies in the opponent's evidence designated in or in connection with the motion entitle the moving party to judgment as a matter of law.

Id. (quoting Anchorage Assoc. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 175 (3d Cir. 1990). In other words, the motion may be granted only if the moving party is entitled to judgment as a matter of law. Id. Further, where a plaintiff has failed to respond to a defendant's summary judgment motion, "the court need only examine the pleadings, including the complaint and the evidence attached to the defendant's motion." Id. (citations omitted).

III. DISCUSSION.

A. Federal Claims Against the District Attorney's Office.

Plaintiffs have not responded to the Motion for Summary Judgment filed by the District Attorney's Office.[4] However, in their Complaint, Plaintiffs claim that District Attorney's Office is liable under section 1983 because it acquiesced to, tacitly approved and encouraged, within the Philadelphia Police Department, a policy or custom or permitting police officers to submit affidavits of probable cause containing false statements or statements made with reckless disregard for the truth. Compl. at ¶ 46. Plaintiffs further assert that the District Attorney's Office failed to curb the practice of submitting such affidavits through training, supervision, investigation, and discipline of police officers. Id. at ¶ 47.[5]

In Monell v. Department of Soc. Servs. of the City of

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[4] Courts in this Circuit have granted Motions for Summary judgment on this basis, as unopposed, as long as the Motion is appropriate. See Anchorage Assocs. v. Virgin Islands Board of Tax Review, 922 F.2d 168, 174 (3d Cir. 1990); Jones v. Personal Health Care Inc., No.Civ.A. 92-4003, 1992 WL 396784 (E.D.Pa. Dec. 23, 1992).

[5] Mr. Atkinson alleges that, in violation of the Fourth and Fourteenth Amendments, "Defendants deprived the Plaintiff of his rights to freedom from unreasonable arrest; search and seizure; freedom from warrantless arrest; freedom from arrest without probable cause; freedom from the use of unreasonable force by police officers; freedom from malicious prosecution; and due process of law." Compl. at ¶ 44.

Mrs. Atkinson alleges that she was deprived of her Fourth and Fourteenth Amendment rights. Id. at ¶ 57.

New York, 436 U.S. 658, 691 (1978), the United States Supreme Court held that

> [l]ocal governing bodies . . . can be sued under § 1983 . . . [in those situations where] the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by that body's officers. Moreover,. . . local governments . . . may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through the body's official decisionmaking channels.

Monell, 436 U.S. at 690-691. A municipality may not be held liable for the conduct of its employees based on the theory of respondeat superior. Id. at 690-691; Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir.), cert. denied, 519 U.S. 1151 (1997); Abney v. City of Philadelphia, No.Civ.A. 96-08111, 1999 WL 360202, at *4 (E.D.Pa. May 26, 1999). Rather, it is the plaintiff's burden to show the existence of a policy, and that a policymaker is responsible for the policy or has acquiesced to the custom. Gallo v. City of Philadelphia, No.Civ.A. 96-3909, 1999 WL 1212194 (E.D.Pa. Dec. 17, 1999). "A failure to train employees may be sufficient [to impose municipal liability], but only if that 'failure amounts to deliberate indifference to the rights of persons with whom the police come into contact.'" Faust v. Powell, No.Civ.A. 99-4080, 2000 WL 193501, at *1 (E.D.Pa. Feb. 18, 2000)(quoting Montgomery v. DeSimone, 159 F.3d 120, 126-27 (3d Cir. 1998)). Moreover, a failure to train police officers can only form the basis for a 1983 claim if the

plaintiff shows "contemporaneous knowledge of a prior pattern of similar incidents and circumstances under which the supervisor's actions or inaction could be found to have communicated a message of approval to the offending subordinate." Id.

In the instant case, we have already determined that the Plaintiffs failed to establish the existence of a policy of submitting affidavits of probable cause containing information known to be false or in reckless disregard of the truth within the Police Department. See Atkinson, 2000 WL 295106, at *4. Moreover, even if such a policy existed, Plaintiffs have failed to provide any evidence that the District Attorney's Office tacitly approved, encouraged or acquiesced to such policy. Finally, Plaintiffs have provided no evidence that the Philadelphia District Attorney's Office had the responsibility to train, supervise, or discipline Philadelphia police officers, but failed to do so. Accordingly, summary judgment is granted in favor of the District Attorney's Office as to all of Plaintiffs' federal claims.

B. Federal Claims Against Defendants Meissler and Stepney.

Plaintiffs claim that Defendants Meissler and Stepney violated their Fourth and Fourteenth Amendment rights as protected under section 1983 when they "issued affidavits of probable cause which contained statements they knew to be false or which were made in reckless disregard of the truth." (Pls.'

Br. at 17-18).[6] The statements alleged to be false are that Detective Meissler saw Mr. Atkinson at 4610 Woodland Avenue on May 12 and May 13, 1997, and that Officer Stepney purchased marijuana from Mr. Atkinson on May 12, 1997.

The parties agree that the appropriate analysis for claims which challenge affidavits of probable cause used to secure search warrants was set forth in Franks v. Delaware, 438 U.S. 154 (1978). Moreover, in Sherwood v. Mulvihill, the United States Court of Appeals for the Third Circuit (the "Third Circuit") explored the Franks analysis, explaining that under section 1983, in order to challenge the validity of a search warrant by asserting that the police officer submitted a false affidavit to the issuing judge, a plaintiff must satisfy a two-part test. Sherwood, 113 F.3d 396 (3d Cir. 1997). The plaintiff must show by a preponderance of the evidence that: (1) the affiant knowingly and deliberately, or with a reckless disregard

[6] Mrs. Atkinson also asserted that the police entered her home at 1010 Serrill Avenue with force and intimidation, and unlawfully searched the premises for Mr. Atkinson. Defendants argue that Mrs. Atkinson lacks standing to assert this claim because during discovery, it was learned that Mrs. Atkinson was in the Cayman Islands at the time the police entered her residence. (See Cymbal Atkinson Dep. at 20-23). Plaintiffs concede that they have "no argument" as to this assertion. (Pls.' Br. at 21 n.2). Accordingly, Plaintiffs have presented no evidence which could support the allegation that the officers entered Mrs. Atkinson's home with force and intimidation. As the entry of her home is the only incident which forms the basis of Mrs. Atkinson's federal claims, summary judgment is granted in favor of all Defendants as to all of these claims.

for the truth, made false statements or omissions that created a falsehood in applying for a warrant; and (2) that such statements or omissions are material, or necessary to the finding of probable cause. Id. at 399.

Moreover, "[m]ere unfounded and unsupported allegations that the warrant was not based on probable cause, but rather on false statements, and deception are not sufficient to subject officials to the cost and burdens of trial." Myers v. Morris, 810 F.2d 1437, 1457 (8th Cir.), cert. denied, 108 S.Ct. 97 (1987) (quoting Fullman v. Graddick, 739 F.2d 553, 562 (11th Cir. 1984)). To survive a summary judgment motion, a plaintiff must make a "substantial preliminary showing" of knowing or reckless disregard for the truth. Morris v. Orman, No.Civ.A. 87-5149, 1989 WL 17549, at *7 (E.D.Pa. Mar. 1, 1989)(citing Perlman v. City of Chicago, 801 F.2d 262, 264 (7th Cir. 1986), cert. denied, 480 U.S. 906 (1987); Krohn v. United States, 742 F.2d 24, 31 (1st Cir. 1989)).

In the instant case, Plaintiffs have provided no evidence to support the conclusion that the Defendants acted with knowledge that the statements they made were false. Moreover, Plaintiffs concede that Defendants can not be held liable if they were "merely mistaken or negligent in identifying the Plaintiff." (Pls.' Br. at 19); see also Lippay v. Christos, 996 F.2d 1490, 1501 (3d Cir. 1993). Therefore, Plaintiffs' only remaining

avenue is to establish that the Defendants acted with reckless disregard for the truth in submitting the affidavits.

Recently, in Wilson v. Russo, the Third Circuit set forth the standards for establishing reckless disregard for the truth in the context of challenges to statements contained in affidavits of probable cause. Wilson v. Russo, ___ F.3d ___, No. Civ.A. 9805283, 2000 WL 641201 (3d Cir. 2000). In Wilson, the Third Circuit held that in order to establish such reckless disregard, a plaintiff must show that, viewing all of the evidence, the officer "must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the truth of what he or she is asserting." Id. at *7 (citations omitted). Assertions can be made with reckless disregard for the truth even if they involve minor details, as recklessness is not measured by the relevance of the information provided, but the "demonstration of willingness to affirmatively distort truth." Id. However, the plaintiff must show that the speaker making the assertions acted with a "high degree of awareness of [the statements'] probable falsity." Id. (citations omitted).

In the instant case, Plaintiffs assert, without citation to any authority, that the Defendants acted in reckless disregard for the truth because "given Atkinson's several alibi witnesses, a jury could very reasonably conclude that he was not at 4610 Woodland Avenue on May 12 and May 13 at the time Moving

Defendants said he was."[7] (Pls.' Br. at 19). Plaintiffs claim that the Defendants had "excellent opportunities" to observe Plaintiff on more than two occasions, had "clear views of him" and that Defendant Stepney alleged he had engaged in a hand to hand drug transaction with Mr. Atkinson. Id. Plaintiffs then urge that a jury must decide whether the Defendants were merely mistaken or negligent, and that "a jury could very well and soundly conclude that there was no way Moving Defendants could have been mistaken or negligent in identifying him and that, therefore, the only reason they mentioned Mr. Atkinson in their affidavit is because they intended to falsely arrest and prosecute him." Id.

However, Plaintiffs' bald allegations fall far short of the required showing of reckless disregard as outlined in Wilson, Sherwood, and Franks. Plaintiffs have provided no evidence of

[7] The statements of these alibi witnesses to which Plaintiffs refer have been provided to this Court along with Plaintiffs' Opposition Brief, and are the subject of a Motion to Strike Exhibits, which was filed by Defendants. However, because Defendants' summary judgment motions are granted, this Motion is denied as moot.

Moreover, the statements of these witnesses, that Mr. Atkinson was not at the scene of the crime, do not establish that the Defendants had a high degree of awareness of the falsity of their statements. Again, if anything, these witnesses merely establish inactionable mistake or negligence. They do not support the conclusory proposition that the Defendants lied or blindly ignored the truth. Moreover, as Defendants point out, an absurd result would obtain if the mere existence of an alibi, without any other evidence, were held sufficient to sustain a lawsuit challenging allegedly false statements in affidavits of probable cause.

Defendants willingness to distort the truth. They provide no basis for their assertion that the Defendants "wanted to identify the wrong man." Id. at 19-20. In fact, Plaintiffs' allegations, if probative of anything, would merely establish that the Defendants were mistaken in their identification of Mr. Atkinson. Plaintiffs provide no basis for this Court to conclude that the Defendants acted in any manner inconsistent with a good faith belief that the information they included in the affidavit of probable cause used to obtain the arrest warrant for Mr. Atkinson was accurate.[8] Finally, especially persuasive is the fact that Mr. Atkinson, in his own deposition testimony, repeatedly referred to the Defendant police officers' alleged misidentification of him in the affidavit of probable cause as a "mistake." (See Claudius Atkinson Dep. at pp. 93, 95, 96).[9]

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[8] Moreover, even if the record contained any facts which might provide a modicum of support for these allegations, and we strongly suspect it does not, "the burden is on the plaintiff, not the court, to cull the record and affirmatively identify genuine, material, factual issues sufficient to defeat a motion for summary judgment." Morris v. Orman, No.Civ.A. 87-5149, 1989 WL 17549, at *8 (E.D.Pa. Mar. 1, 1989)(citing Childers v. Joseph, 842 F.2d, 689 (3d Cir. 1988)).

[9] Defendants have also argued that the issue of the veracity of the individual defendants' statements may not be relitigated in this case as it is precluded by the findings of fact made by the Honorable Benjamin Lerner of the Philadelphia Court of Common Pleas in connection with a judgment of forfeiture proceeding in which 4610 Woodland Avenue was forfeited to the Commonwealth. (Mot. Summ. J. Meissler and Stepney at pp. 6-11). Because we find the Plaintiffs' claims to be wholly devoid of merit, we do not reach the preclusion issue.

Accordingly, summary judgment is granted in favor of Defendants Meissler and Stepney with regard to Plaintiffs' federal claims.[10]

C. State Law Claims Against All Defendants.

1. Mr. Atkinson.

a. Malicious Prosecution, False Arrest, and False Imprisonment.

Mr. Atkinson's only argument in support of his malicious prosecution claim is a reference to his argument with respect to his federal claims, which is without merit. (Pl.'s Br.

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[10] Plaintiffs also assert a nebulous claim for conspiracy against all Defendants. Plaintiff's entire argument in support of this claim, again bereft of any citation to authority, is that "it is clear from their own affidavits and court testimony that both of them were working together when they claimed they witnessed Plaintiff Claudius Atkinson sell marijuana on May 12 and May 13. Both their observations are mentioned in the affidavit of probable cause, which is at issue in this matter. Accordingly, it would be reasonable for the jury to decide there was a conspiracy between them to violate Plaintiffs' rights." (Pls.' Br. at 21).

However, to bring a conspiracy claim, a plaintiff must plead the circumstances of the alleged wrongdoing with particularity. Loftus v. SEPTA, 843 F. Supp. 981, 986 (E.D.Pa.), aff'd, 187 F.3d 626 (3d Cir. 1999)(citations omitted). Plaintiffs have provided no evidence to define their conspiracy claim, much less support it, and so it is dismissed.

Finally, Defendants assert that Plaintiffs also allege claims under 42 U.S.C. sections 1985 and 1988. Our review of the Complaint reveals that the only mention of section 1985 is contained in a paragraph within the section entitled "Jurisdiction." Compl. at ¶ 2. Section 1985 does not form the basis for either Count of the Complaint. Additionally, Plaintiff has made no further mention of section 1985. As such, to the extent that Plaintiffs have brought this claim, it is dismissed. Moreover, section 1988, which provides for attorney's fees and expert fees, is inapplicable in this case in light of the fact that all of Plaintiffs' claims fail.

at 22). Moreover, he argues that since Mr. Atkinson's arrest was without probable cause, he has made out his claims for false arrest and false imprisonment. Id. Mr. Atkinson is correct that he must establish the lack of probable cause to sustain his claims for malicious prosecution, false arrest and false imprisonment. DiNicola v. DiPaolo, 25 F.Supp.2d 630, 637 (W.D.Pa. 1998)(citing Groman v. Township of Manalapan, 47 F.3d 628, 634 (3d Cir. 1995)). However, as discussed above, he has failed to do so, and these claims are dismissed.

b. Intentional Infliction of Emotional Distress.

Under Pennsylvania law, to state a claim for the tort of intentional infliction of emotional distress, a plaintiff must allege conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Decesare v. National R.R. Passenger Corp., No.CNA 98-3851, 1999 WL 33025, at *6 (E.D.Pa. May 24, 1999) (quoting Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988)). Additionally, a plaintiff must allege "physical injury, harm, or illness caused by the alleged outrageous conduct." Corbett v. Morgenstern, 934 F. Supp. 680, 684 (E.D. Pa. 1996). As the Supreme Court of Pennsylvania has stated, "[c]ases which have found a sufficient basis for a cause of action of intentional infliction of emotional distress have presented only the most

egregious conduct." Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998); Papieves v. Lawrence, 437 Pa. 373, 263 A.2d 118 (1970)(defendant, after striking and killing plaintiff's son with automobile, and after failing to notify authorities or seek medical assistance, buried body in a field where discovered two months later and returned to parents).

In the instant case, the conduct Mr. Atkinson complains of does not rise to the level of atrocity necessary to sustain this claim. Further, Mr. Atkinson concedes that he has not made out this claim. (Pl.'s Br. at 22). As such, it is dismissed.

2. Mrs. Atkinson.

Once again, Plaintiffs concede that they have "no argument" regarding Defendants' claims that Plaintiffs have failed to establish Mrs. Atkinson's false arrest, false imprisonment, and intentional infliction of emotional distress. In light of this concession, and particularly due to the fact that Mrs. Atkinson was out of the country at the time the events allegedly giving rise to her claims transpired, summary judgment is granted in favor of all Defendants as to these claims. Moreover, Mrs. Atkinson's loss of consortium claim cannot sustain in light of the fact that this Court has dismissed all of Mr. Atkinson's claims.

An appropriate Order follows.